Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *GR v Minister of Employment and Social Development*, 2020 SST 1032

Tribunal File Number: AD-20-783

BETWEEN:

G. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: December 10, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant completed high school and a cosmetology program as an adult. She has worked as a self-employed hairdresser and at a lottery booth. She stopped working in 2008. The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by a number of medical conditions, including low heart rate resulting in a pacemaker being inserted, irritable bowel syndrome, bronchitis and respiratory issues, anxiety with panic attacks, and depression.

[3] The Minister of Employment and Social Development refused the application. It decided that the Claimant did not have a disability that is severe under the *Canada Pension Plan* before the end of her minimum qualifying period (MQP – the date by which a claimant must be disabled to receive the disability pension).

[4] The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that the Claimant's disability was not severe before the end of the MQP, which is December 31, 2002.

[5] Leave to appeal this decision to the Tribunal's Appeal Division was granted because the General Division may have made an error of law. However, after considering the parties written and oral submissions, the written record, and the General Division decision, I have decided that the General Division did not make an error of law. It also did not base its decision on any important factual error. As a result, the appeal is dismissed.

PRELIMINARY MATTERS

[6] In her written submissions, the Claimant wrote that she was not able to properly present her case to the General Division. She speaks slowly and, when interrupted, loses her train of

thought. She said that the General Division member interrupted her, and this impaired her ability to properly present her case to the Tribunal.

[7] However, during the Appeal Division hearing, the Claimant withdrew this ground of appeal. Therefore, it is not necessary to address this issue.

[8] At the end of the General Division hearing, counsel for the Minister asked for the opportunity to file further written submissions. Permission to do so was granted. The Minister wrote that the Claimant could request that this appeal be put on hold so that she could make an application for the General Division decision to be rescinded or amended based on new material facts.[1] The Claimant told the Tribunal that she did not have any new evidence and would not pursue such an application.

ISSUES

[9] Did the General Division make an error of law when it failed to consider whether the Claimant's work after the MQP was a substantially gainful occupation?

[10] Did the General Division base its decision on an important factual error regarding her ability to work after the MQP?

ANALYSIS

[11] An appeal to the Tribunal's Appeal Division is not a rehearing of the original claim. Instead, the Appeal Division can decide only whether the General Division:

a) failed to provide a fair process;
b) failed to decide an issue that it should have, or decided an issue that it should not have;
c) made an error of law; or

[1] The Tribunal may rescind or amend a decision based on new material facts under section 66 of the *Department of Employment and Social Development Act*.

d) based its decision on an important factual error.[2]

The Claimant's Work After the MQP

[12] To be disabled under the *Canada Pension Plan*, a person must have a disability that is both severe and prolonged. A disability is severe if, as a result of that disability, the person is incapable regularly of pursuing any substantially gainful occupation.[3] Part-time, casual, or seasonal work can be a substantially gainful occupation. In this case, the Claimant worked part-time as a hairdresser for seniors and at a lottery booth after the end of the MQP. The General Division refers to this work.[4] It does not, however, consider whether this work was a substantially gainful occupation.

[13] The General Division made no error when it failed to consider this. The General Division had to decide whether the Claimant was disabled on or before the end of the MQP. It did so, and it gave a number of reasons for its conclusion, including:

a) There was not enough medical evidence to prove that the Claimant had a severe medical condition before the end of the MQP;[5]

b) The Claimant's representative at the General Division hearing acknowledged that there was no medical evidence that the Claimant's health conditions interfered with her ability to work at the end of the MQP;[6] and

c) The Claimant said that she was not disabled until 2008.[7]

[14] The decision does not rest on whether the Claimant's part-time work after the MQP demonstrated that she had capacity regularly to pursue any substantially gainful occupation. The decision is based on the lack of proof of a serious health condition before the end of the MQP.

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[2]This paraphrases the grounds of appeal set out in section 58(1) of the *Department of Employment and Social Development Act*.
[3] See section 42(2)(a) of the *Canada Pension Plan*.
[4] General Division decision at para 21.
[5] General Division decision at paras 11–13.
[6] General Division decision at para 14.
[7] General Division decision at paras 20–21.

[15] The General Division considered the Claimant's work after the end of the MQP in the context of her testimony. It asked the Claimant about statements she had made before the hearing that she was not disabled until after 2002. It was not persuaded by her response. The General Division gave specific reasons for this, including:

a) She stated that she was disabled before 2002 at the hearing and not before;

b) She did not apply for the disability pension until 2008;

c) Her psychiatrist wrote that the Claimant had been off work for one year in 2009; and

d) She had earnings in 2005 and 2007 that were consistent with her historical earnings.

This demonstrates that the General Division relied on the Claimant's evidence about her work after the MQP to evaluate her credibility, not her capacity to work.

[16] To decide whether work is a substantially gainful occupation, income earned as well as work conditions and expectations are to be evaluated.[8] The Claimant did not present evidence about any workplace accommodations or changes in duties, pay, or work conditions that would assist the General Division in deciding whether her work after the MQP was a substantially gainful occupation. The General Division cannot be faulted for failing to consider these things when there was no evidence for it to do so.

[17] The General Division made no error of law. The appeal fails on this basis.

Important Factual Error

[18] The Claimant also says that the General Division based its decision on an important factual error regarding her ability to work after the MQP. To succeed on appeal on the basis that the General Division made an important factual error, the Claimant must prove three things:

a) that a finding of fact was erroneous (wrong);

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[8] See *KA v Minister of Human Resources and Skills Development*, 2013 SSTAD 6; and *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

b) that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and
c) that the decision was based on this finding of fact.[9]

[19] However, the Claimant does not point to any specific finding of fact that she says was made in error. She argues that some people continue to work despite being in pain. The General Division decision sets out the evidentiary basis for its findings of fact. For example, the decision finds as fact that the Claimant was not disabled before the end of the MQP. It relies on the lack of medical evidence of any condition that impaired her functioning at that time and her statements that she was not disabled until 2008.

[20] Therefore, the appeal fails on this basis.

CONCLUSION

[21] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	December 1, 2020
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	G. R., Appellant Jordan Fine, Counsel for the Respondent

[9] See section 58(1)(c) of the *Department of Employment and Social Development Act*.